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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 83

ANTONIO RICHARD ROCHIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

I

We wish to emphasize as the major ground for reversal of petitioner's conviction that conviction upon evidence found by the Deputy Sheriffs through forcibly causing to be inserted an instrument and chemical into the suspect's internal organs, is not an "appropriate procedure" under Anglo-Saxon standards. *Watts* v. *Indiana*, 338 U. S. 49, 55.[1]

[1] The Court must determine "upon the whole course of the proceedings . . . whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York*, 324 U. S. 401, 416-417 (concurring opinion by Frankfurter, J.; agreement expressed with his views on the law by four other Justices, 324 U. S. at p. 438.) For, due process guarantees all that is "implicit in the concept of

But assuming *arguendo* that the constitutionality of petitioner's conviction involves the issue of whether there are effective remedies for the unconstitutional invasion of petitioner's person, other than a prohibition on the use of the evidence forcibly extracted from him, we submit that respondent's argument as to the significance of a *civil* remedy (Respondent's Brief, pp. 36-39), is erroneous.

Obviously decisions upholding the recovery of illegally seized goods furnish no remedy or deterrent in a case like the instant one in which the only returnable goods,—the empty capsules,—are of no value and scant importance. Nor do the *Noak* and *Silva* cases (Respondent's Brief, p. 38) indicate any greater hope for the correction of the instant illegal practice of officers, police or sheriff, through civil litigation. In both cases the only recovery allowed was the actual value of goods seized and destroyed and concomitant loss of earnings. There does not appear to be any California cases showing recovery of damages for violation by the police of constitutional rights as such, apart from property damage, and it seems clear that any damages awarded for an unconstitutional act such as that committed upon petitioner would be small, perhaps merely nominal.[2] See *White* v. *Towers*, (Sept. 1951) 37 Ad. Cal. Rep. 734, 737. (See Petitioners Opening Brief p. 7.) Thus it is impossible to look to the civil suit as a deterrent to the police or sheriff's subjecting suspects to the stomach pump. It is to be noted that even in the situation presented in *Wolf* v. *Colorado*, 338 U. S. 25, this Court did not indicate that it regarded an action for damages as a practical possibility.

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ordered liberty." *Palko* v. *Connecticut*, 302 U. S. 319, 325. See argument in brief of American Civil Liberties Union, pp. 7-8, 11, filed amicus.

[2] See *Maher* v. *Wilson*, 139 Cal. 514, 73 Pac. 418; also *Davidson* v. *Devine*, 70 Cal. 519, 11 Pac. 664; *Gray* v. *Craig*, 127 C.A. 374, 16 P. 2d 798, as to nominal damages. *White* v. *Tower* (1951), 37 Ad. Cal. Rep. re no recovery.

Disciplinary action against the police, on which the Court did place some emphasis, is likewise out of the question in the instant situation, as demonstrated in the Brief of Amicus Curiae, at page 13. Moreover, under California law, the superior officers of the Deputy Sheriffs are not liable in damages.

Michael v. *Smith*, 188 Cal. 199.

Finally, in the instant case, as of the present time the petitioner is without remedy, so far as his suit for damages in the California Courts is concerned, because the Statute of Limitations has elapsed.

Thus California Code of Civil Procedure Section 430(3), provides for a one year Statute of Limitations for assault, battery, and false imprisonment.

Indeed, the Statute had already elapsed at the time of the decision of the Court of Appeals below, December 12, 1950 (R. 180), since the assault on the petitioner was on July 1, 1949 (R. 181).

II

Respondent's brief places some emphasis upon the point that petitioner did not voice his objection to the extraction of evidence from him with the stomach pump. But certainly it would not be proper for this Court to find that petitioner voluntarily subjected himself to this procedure, when this issue was not argued to the trial court (R. 117). Both it and the Court of Appeal whose decision is here under review based their decisions on the premise that petitioner had been forced to submit to the invasion of his person.[3] Furthermore, if the issue were to be considered, it is clear that petitioner cannot be deemed to have consented to the Sheriff's extraction of evidence with the stomach pump, nor to have waived his objection to the

[3] See *Watts* v. *Indiana*, 338 U. S. 49, at p. 52, as to this Court's review of issues of fact.

deprivation of his constitutional right to be free from such invasion.

Petitioner clearly did not know, and neither the police doctor, his assistant, nor the Sheriff gave him any reason to believe that he had a right to object to their violent procedure. Certainly he did not proceed "with eyes open"[4] nor with "full knowledge of his rights and capacity to understand them".[5] Under these circumstances even verbal acquiescense,—and *a fortiori,* silence,—does not constitute "an intentional relinquishment of a known right or privilege",[6] which is essential before a person can be deemed to have sacrificed his constitutional rights.

Not only was petitioner unaware that the way was open to him to refuse to submit to the stomach pump, but in view of the intimidating circumstances, being handcuffed at all times and while in the hospital, he may well have feared even more dire consequences if he opposed the treatment he was receiving. At the least, the prior manhandling by the 3 deputy sheriffs, the handcuffs, the strap, the operating room surroundings, were sufficient to cow him into submission to the will of the police doctor, the doctor's assistant, and Sheriff, and to inhibit his ability to make a deliberate and free choice. Clearly, there was not, with a strap around his middle, with a battered chin and swollen throat, as "there must be, . . . an absence of subverting factors so that the choice is clearly free and responsible."[7] Thus, petitioner's silence was far from the unmistakable and unequivocal demonstration of a free and voluntary consent that is necessary for an effective waiver of constitutional rights.

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[4] *Adams* v. *U. S. ex rel. McCann,* 317 U. S. 269, 279.

[5] *U. S. ex rel. McCann* v. *Adams,* 320 U. S. 220, 221.

[6] *Johnson* v. *Zerbst,* 304 U. S. 458, 464.

[7] *Von Moltke* v. *Gillies,* 332 U. S. 708, 729 (concurring opinion by Justices Frankfurter and Jackson.)

III

The decisions with respect to a motion in advance of trial to suppress illegally obtained evidence (Respondent's Brief pp. 45-46), are clearly irrelevant here. The only tangible objects to which such a motion could have been addressed were the empty capsules and these it would have been pointless to attempt to suppress. The important evidence leading to petitioner's conviction was the testimony with respect to the contents of the capsules, which, though not amenable to a motion to suppress, was affected by the unconstitutionality of the seizure of the capsules equally with the capsules themselves. See *Silverthorn Lumber Co.* v. *United States*, 251 U. S. 385, 392; *Weeks* v. *United States*, 232 U. S. 383, 394-395: *Flagg* v. *United States*, 233 Fed. 481, 486 (C. A. 2nd, 1916). Furthermore, even in the Federal courts, failure to make a motion to suppress does not bar objection to introduction in evidence of the seized object, for the rule as to such motions is only "to be used to secure the ends of justice" and as "a rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Gouled* v. *United States*, 269 U. S. 20, 34.

Finally, and of conclusive importance, this Court cannot import into the instant case the issue of the propriety of a motion to suppress, since the California courts considered the legality of the use of the evidence and of petitioner's objection thereto regardless of his failure to make such a motion.

IV

The suggestion that the police were resorting to "first-aid" treatment for the benefit of the defendant, if made seriously, is without substance. (See respondent's brief pp. 24, 25). For the record discloses that the amount of morphine in the capsules was of such small quantity as to be incapable of harming the petitioner, if allowed to remain

in his stomach (R. 182). The amount was so small that it was consumed in the analysis conducted by the police chemist (R. 182); indeed it was so small that it was less than 1 milligram, not even enough to balance the chemist's scales (R. 54).

Conclusion

In short, the evidence is uncontradicted, and as commented upon by the judges below, is to the effect that the petitioner was a victim of "physical abuse" (Justice Schauer of the California Supreme Court) (R. 192); that the petitioner's "rights were ruthlessly violated". (Justice Carter of the California Supreme Court) (R. 186); and that the petitioner, at least in the opinion of Justice Carter could not have been treated more offensively "in any totalitarian regime—" by "Commisar" or "Gestapo".

The Justices of the District Court of Appeals below had this to say: That the conduct of the sheriff's was "high handed and reprehensible" (Justice Wood) (R. 183); that their acts constituted a "shocking violation of Constitutional Rights" (Justice Valee, at R. 184); and that the officers were "guilty of unlawfully assaulting, battering and torturing" the petitioner (R. 183). That such conduct in the securing of evidence offends Due Process because constituting an unwarranted assault upon the dignity of man is the import of the Court's former decisions. Cf. *McNabb* v. *United States*, 318 U. S. 332, 343; *Brinegar* v. *United States*, 338 U. S. 160, 180; and *Francis* v. *Resweber*, 329 U. S. 459.

Respectfully submitted,

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